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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

18 Cr. 177 (JMF)

5 SHMUEL ZARZAR,

6 Defendant.

Sentence

7 -----x
8 New York, New York
9 October 10, 2018
3:45 p.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
Southern District of New York

17 BY: ELINOR L. TARLOW

Assistant United States Attorney

18 SABRINA SHROFF

19 Attorney for Defendant
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(Case called)

MS. TARLOW: Good afternoon, your Honor. Elinor Tarlow, for the government.

THE COURT: Good afternoon, Ms. Tarlow.

MS. SHROFF: Good afternoon, your Honor.

On behalf of Mr. Zarzar, Federal Defenders of New York, by Sabrina Shroff. I am standing up for my colleague Annalisa Miron, who is out of the office on extended leave.

THE COURT: Good afternoon to you.

Good afternoon, Mr. Zarzar.

THE DEFENDANT: Good afternoon.

THE COURT: We are here for purposes of sentencing. In preparation for today's proceeding, I have reviewed the presentence report, dated September 17, 2018.

I have also received and reviewed the following additional submissions: The defendant's submission dated September 27, 2018, as well as the attachments to that submission, including a forensic psychological report and letter from, I think it's a Dr. Termini, a letter from a licensed social worker at Federal Defenders, a letter from the defendant, letters from various family members, including his mother, grandmother, and siblings, and a letter from a former employer; and the government's submission dated October 3, 2018.

Have the parties received unredacted versions and

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1 copies of each of the other's submissions.

2 MS. TARLOW: Yes, your Honor.

3 MS. SHROFF: Yes, your Honor.

4 THE COURT: All right. Are there any additional
5 submissions that I should have received?

6 MS. TARLOW: Not from the government, your Honor.

7 THE COURT: Anything else?

8 MS. SHROFF: No, your Honor. But I was just told a
9 couple of minutes ago that the government intends to have a
10 person speak at sentencing, and I would ask the Court to allow
11 me to be heard on that right now.

12 THE COURT: OK. Well, that's a separate matter that
13 we'll get to in a moment. But there are no other
14 submissions --

15 MS. SHROFF: No.

16 THE COURT: -- for present purposes?

17 Let me comment on the proposed redactions for a
18 moment.

19 Two things. One is a fairly technical one.
20 Ms. Shroff, I don't know if you're the one who prepared the
21 redactions, and this may be just because of the way in which I
22 handle things and read things, but the way that your office I
23 think routinely does this and uses the redaction tool on Adobe
24 to highlight the portions that have been redacted in the
25 publicly filed version, the problem is that is not consistent

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1 with my rules, and it doesn't actually enable me to view them
2 very easily. So I would ask that you get the word out in your
3 office to make sure that you actually do look at my rules and
4 follow them; namely, by submitting it with the highlighter tool
5 rather than the redaction tool and that you do that without my
6 staff having to follow up and request it from you, just to make
7 sure that I can review things in a timely fashion.

8 All right?

9 MS. SHROFF: Yes, your Honor.

10 THE COURT: All right. Now, more immediately and
11 perhaps substantively, I don't think that the vast majority of
12 the proposed redactions are proper. As I understand it, I
13 mean, the vast majority of them pertain to the defendant's
14 history of drug use and drug abuse, and I think that is sort of
15 the central argument that is being made for leniency here, at
16 least one of the principal ones. In that regard I think the
17 interest in public disclosure outweighs any privacy interest of
18 the defendant with respect to that.

19 So, to the extent that you have redacted information
20 concerning his history of drug use, I think it should be
21 unredacted. There's other material, obviously addresses of
22 those who sent the letters, and then some information
23 concerning Mr. Zarzar's family history and background that I
24 think would be appropriate to keep redacted because there are
25 privacy interests of third parties involved there and then the

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1 names, for example, of the entities where his former employer
2 has worked or does work. Those I think can remain redacted,
3 but the drug use information I think should be unredacted.

4 So if by let's say Monday you can revise your
5 redactions and submit them in accordance with my rules and in
6 highlighted fashion to indicate what remains redacted, I will
7 take a look at it. If I have any problem with what you have
8 resubmitted, I will let you know. But hopefully you can adhere
9 to what I just described as the dividing line.

10 All right?

11 MS. SHROFF: Sure.

12 THE COURT: Thank you.

13 All right. Ms. Tarlow, I was going to ask if the
14 government has advised any victim of rights under the Crime
15 Victim Rights Act and if there was anyone present here on
16 behalf of the victim or victim him or herself. Perhaps that
17 gets to the issue that Ms. Shroff alluded to a moment ago.

18 So?

19 MS. TARLOW: Yes, your Honor, there are two family
20 members of the victim present in the courtroom today. One of
21 them may want to speak at a later point at sentencing.

22 THE COURT: All right. Ms. Shroff?

23 MS. SHROFF: Is that notice? Do you want me to
24 address the argument, your Honor?

25 THE COURT: With respect to whether they should be

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1 allowed to speak or --

2 MS. SHROFF: Yes, your Honor.

3 THE COURT: Sure. Why not.

4 MS. SHROFF: I don't mean to be disrespectful to
5 anybody who is in the audience. Did you want me to do it at
6 sidebar?

7 THE COURT: I don't know what you're planning to say.
8 I would think that it's really a legal question.

9 MS. SHROFF: That's correct, your Honor.

10 THE COURT: In that regard I would think that you
11 could state it in open court, but go ahead.

12 MS. SHROFF: Your Honor, I literally learned of this
13 less than two minutes ago, but I do not believe that the
14 individuals being proffered to the Court properly fall within
15 the definitional section of 18 U.S.C.3771. The definitional
16 section or the authorizing section defines the victim as
17 somebody who's directly and proximately harmed by the committed
18 conduct. The committed conduct here, the conduct that
19 Mr. Zarzar pled to and as reflected in the PSR is the receipt
20 of child pornography.

21 For that particular conduct and for that particular
22 crime, the victim in this case whose parents are in court was
23 not, in fact, contacted. The victim was never asked for a
24 photograph, and the victim was never proximately or directly
25 impacted by this conduct.

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1 By the time that Mr. Zarzar requested any attempted
2 receipt or photographs, the person that was being contacted by
3 Mr. Zarzar was not in fact a 12-year-old but the undercover
4 officer. For that reason, the victim who is directly and
5 proximately impacted is not the person whose parents are in
6 court.

7 Additionally, your Honor, if I could ask the Court to
8 take a look at the final PSR, which contains the recommendation
9 section, specifically paragraph 14. The probation officer, who
10 is a very experienced probation officer in this case, Mr. Ross
11 Kapitansky, had more than one effort at having reached out and
12 was told that, and I quote, that his daughter had learned a
13 lesson and was not terribly impacted by text exchanges. That
14 was the conduct to which she was subject, since that is not the
15 conduct to which Mr. Zarzar pled, again, the parents are not
16 properly within the definitional section of the crime victims
17 act.

18 THE COURT: Ms. Tarlow, your response and your
19 thoughts.

20 MS. TARLOW: Yes, your Honor.

21 This is the first I am hearing of this argument, but
22 at first blush I would say this may be a moot matter. I don't
23 know again if the family member would like to speak. If the
24 family member does want to speak, I would just note for your
25 Honor that, although paragraph 14 says the victim was not

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1 terribly impacted, there was, of course, some impact as we have
2 alleged in our --

3 THE COURT: Let me put that argument to the side. I
4 think that paragraph doesn't cut either way with respect to
5 whether anyone who wishes to speak should be allowed to speak
6 or has a right to speak. I think the more salient question is
7 whether the parents have a right to speak under the Crime
8 Victim Rights Act.

9 On that I confess I don't know the law insofar as by
10 the time the actual criminal offense was committed here the
11 person involved on the other end was not actually the minor any
12 longer, but an undercover. Having said that, the defendant
13 believed that person would be the minor, and in that regard was
14 sort of the intended victim. I just don't know what the law is
15 on that.

16 So, my concern is that to comply with the law, the
17 parents may have the right to speak, and in that regard I would
18 be committing error if I don't let them; but if they don't have
19 the right to speak, I might be committing error to let them
20 speak. Maybe we should find out if they wish to, and then we
21 can find out whether it's necessary to drill down and get to
22 the bottom of that, in which case we can discuss how to do
23 that.

24 MS. TARLOW: Yes, your Honor.

25 May I have a moment?

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1 THE COURT: You may.

2 (Pause)

3 MS. TARLOW: After conferring with the family member
4 of the victim, they have decided not to speak.

5 THE COURT: Then it's a moot point, and we can proceed
6 from there.

7 All right. I do want to make clear if this changes
8 anything you can let Ms. Tarlow know and signal somehow. I'm
9 prepared to figure out whether you do have the right to speak.
10 In that regard if you do want to speak, I don't want you to be
11 deterred by the discussion that just happened.

12 There are just different rights at stake here, and I
13 want to make sure I both get them right and strike the right
14 balance to the extent I even have discretion in the matter.
15 The bottom line is I'm happy to look into it if there's any
16 interest, but if there isn't I think we can proceed.

17 Ms. Shroff?

18 MS. SHROFF: Your Honor, our argument was last minute
19 only because we learned two minutes ago. Obviously, if the
20 Court thinks the sentencing should be adjourned so that
21 everybody has time, we have no objection. But it's not an
22 argument I knew of. I only learned of this literally two
23 minutes before.

24 THE COURT: I understand, and I do not fault you for
25 that. For that matter I don't know if Ms. Tarlow knew

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1 beforehand that this might be an issue, but suffice it to say I
2 would be prepared to adjourn if the gentleman here did wish to
3 speak in order to figure out whether that is the right course
4 of action, and that's more or less what I was saying a moment
5 ago. But, absent an indication that there is a desire to
6 speak, I think we can proceed today.

7 So, for now, I will at least assume that we can
8 proceed.

9 On that score, Ms. Shroff, have you read the
10 presentence report?

11 MS. SHROFF: I read the presentence report, your
12 Honor, both the draft and the final version.

13 THE COURT: Have you discussed it with Mr. Zarzar?

14 MS. SHROFF: I have.

15 THE COURT: Mr. Zarzar, have you read the presentence
16 report?

17 THE DEFENDANT: Yes, I have.

18 THE COURT: Have you discussed it with your lawyers?

19 THE DEFENDANT: I have.

20 THE COURT: Did you have enough time to go over the
21 report with them, to discuss any mistakes in the report and
22 anything that you would wish to bring to my attention in
23 connection with your sentencing?

24 THE DEFENDANT: I have.

25 THE COURT: Keep your voice up, please, so that we can

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1 all hear you.

2 Ms. Shroff, putting aside the guidelines for a moment,
3 any objections to the factual accuracy of the presentence
4 report?

5 MS. SHROFF: No, your Honor.

6 THE COURT: Ms. Tarlow, have you reviewed the
7 presentence report?

8 MS. TARLOW: Yes, your Honor.

9 THE COURT: Any objections to the factual accuracy of
10 the report?

11 MS. TARLOW: No, your Honor.

12 THE COURT: Hearing no objections, I will adopt the
13 factual recitations set forth in the presentence report, which
14 will be made part of the record in this matter and kept under
15 seal. If an appeal is taken, counsel on appeal may have access
16 to the sealed report without further application to me.

17 As counsel know, I'm not bound by the sentencing
18 guidelines, but I do have to consider the applicable guidelines
19 range, and I must accurately calculate that range in the first
20 instance. Here the parties entered a stipulation with respect
21 to the calculation of the guidelines range. Am I correct that
22 the probation department's calculation is consistent with the
23 parties' calculation?

24 MS. TARLOW: Yes, your Honor.

25 MS. SHROFF: Yes, your Honor.

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1 THE COURT: So, based on the parties' agreement, and
2 the absence of any objection and my own independent evaluation
3 of the sentencing guidelines, I accept and adopt the guidelines
4 calculation set forth in the presentence report. That is,
5 using the November 2016 edition of the guidelines, I find that
6 the total offense level is 31, the criminal history category is
7 I, the guidelines range is 108 to 135 months' imprisonment, and
8 the fine range is 30,000 to 250,000 dollars.

9 In the plea agreement, both sides agreed not to seek a
10 departure from the guidelines sentence and guidelines range, is
11 that correct?

12 MS. TARLOW: Yes, your Honor.

13 MS. SHROFF: Yes, your Honor.

14 THE COURT: I have, nevertheless, considered whether
15 there is an appropriate basis for a departure that is distinct
16 from what has come to be known as variance pursuant to Section
17 3553(a), and I do not find that there are grounds for a
18 departure.

19 Having settled all that, I will hear first from the
20 government and then from Ms. Shroff and from Mr. Zarzar if he
21 wishes to say anything and before proceeding to sentencing.

22 Ms. Tarlow.

23 MS. TARLOW: Yes, your Honor.

24 For the reasons set forth in our submission, we submit
25 that a sentence above the mandatory minimum and a significant

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1 term of imprisonment would be appropriate in this matter,
2 primarily to reflect the seriousness of the defendant's offense
3 and to afford adequate deterrence to other individuals who are
4 similarly situated.

5 First, with respect to the defendant's offense conduct
6 in this matter, as your Honor is aware, the defendant
7 repeatedly sent messages to an undercover law enforcement
8 office who was assuming the identity of the victim for
9 photographs in which the victim would be, quote, basically
10 naked because they were, quote, going to see each other naked
11 anyways.

12 The defendant directed the victim to lift up her shirt
13 to show him her belly. When the undercover official refused,
14 acting as the victim, the defendant continued to request those
15 photographs, stating that the victim would be, quote, in such
16 trouble if you go to sleep without sending me the pic.

17 But the defendant didn't just attempt to possess child
18 pornography, and he didn't just engage in mere communications
19 behind the safety of a computer or phone. The defendant
20 discussed engaging in sexual activities with a 12-year-old
21 child who lived in his neighborhood or who he believed was a
22 12-year-old child who lived in his neighborhood, and he took
23 concrete actions. He persistently told the victim and the
24 undercover official that he wanted to meet in person. Despite
25 the refusals, the defendant actually went to the victim's

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1 school, where he waited outside for several hours and was
2 observed doing so by law enforcement officials.

3 He attempted to give the victim a phone so that his
4 conversations could not be detected by her parents. When the
5 defendant did not see the victim at her school where he had
6 placed the phone, he then asked to meet her at her home.

7 Despite the undercover's refusals to provide the
8 defendant with the victim's home address, the defendant said
9 that he then searched online and found the victim's home
10 address. When the victim finally agreed to meet with the
11 defendant, again, the undercover official acting as the victim,
12 the defendant described explicit sexual interactions that he
13 wanted to have, and he expressed pleasure at the thought that
14 he would be the first individual to engage in such conduct with
15 the victim.

16 He then traveled from Brooklyn to Manhattan in order
17 to meet with the victim, presumably to engage in the sexual
18 activities that he had discussed with her a few days earlier.
19 That conduct spanned several months, despite the defendant
20 knowing that his victim was a minor or believing that she was a
21 minor, that she was 12 years old, and his actions were not the
22 product of rash decision making or a momentary lapse in
23 judgment. They constituted a sustained pattern of conduct over
24 several months, during which time, as I just said, he was able
25 to have a cell phone, devise a plan to provide the victim with

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1 a cell phone and research and find the victim's home address.

2 For that entire period he never disengaged, he never
3 had a moment of clarity of the inappropriateness of his
4 actions.

5 With respect to general deterrence, as your Honor is
6 well aware these kinds of crimes have very long lasting and
7 devastating effect on their victims. Although law enforcement
8 intervened before the defendant had any sexual conduct with an
9 actual victim, he did pose a significant threat to her. I
10 mentioned he stood outside of her school for several hours. He
11 encouraged the victim -- and this was when he was actually
12 speaking to the 12-year-old -- to attempt to conceal her
13 conduct by encouraging her disobey her parent's instructions to
14 avoid strangers and by suggesting that the victim use a
15 different phone to communicate with him.

16 Very briefly, just to respond to a few of the
17 defendant's points noting reasons for judicial leniency, as we
18 stated in our submission, we don't believe that the defendant's
19 abuse of narcotics means that the defendant is any less
20 culpable or in any way justifies his conduct.

21 The actions that he took endangered the welfare of a
22 12-year-old child who lived in his neighborhood. He knew where
23 the child went to school. He waited outside the victim's
24 school. He took steps to determine where the victim lived. He
25 attempted to have the victim send pornographic images to him,

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1 and he discussed sexual activities that he intended to engage
2 in with the victim.

3 There is a real danger that the defendant may return
4 to using substances upon his release, and he may return to
5 similar conduct. Over the last five years he struggled with
6 addiction. He's been arrested on four occasions for narcotics
7 offenses. Some of those are pending.

8 During that period he cycled through medical
9 treatment. He recognized at one point in time the seriousness
10 of his substance abuse issues, he attempted to detox on his
11 own, but he failed, and he returned to abusing substances. As
12 he noted in his submission, when his insurance lapsed, he then
13 increased his intake of opiates and turned to using heroin.

14 Just as a final point, the defendant claims that he
15 would not return to conduct similar to the instant offense.

16 I just want to highlight for your Honor, as we did in
17 our submission, that the Dr. Termini concluded that the
18 defendant "is not sexually attracted to minors aged 13 or
19 younger, but has a primary attraction to females aged 14 to
20 17."

21 The government is troubled by that fact for a variety
22 of reasons, including if the defendant returns to using
23 substances that he might be susceptible to acting on those
24 attractions. Your Honor, for all those reasons, we suggest
25 that a sentence, a significant term of imprisonment above the

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1 mandatory minimum would be appropriate in this matter.

2 THE COURT: Let me ask a couple of specific questions
3 if I might.

4 First, notwithstanding what you just said, I take it
5 from your sentencing submission that you do believe that a
6 below-guidelines sentence would not be inappropriate or would
7 be unreasonable, is that correct?

8 MS. TARLOW: Yes, your Honor. We primarily based our
9 determination on the fact that there is no charged conduct of
10 similar type of offenses. The government did a review of the
11 defendant's e-mail account and did not find evidence of any
12 kind of similar conduct, including possession of child
13 pornography or enticement of minors, as well as the defendant's
14 characteristics and history prior to abusing narcotics and his
15 childhood and own record.

16 THE COURT: Do you want to respond to the defendant's
17 arguments with respect to the guidelines here?

18 Obviously, the guideline has been the subject of some
19 judicial attention and criticism, but I don't know whether or
20 to what extent that applies in this particular case.

21 MS. TARLOW: Right. We don't take a position as a
22 general matter with respect to the appropriateness of the
23 guidelines for these types of crimes.

24 THE COURT: All right.

25 Then two other questions. Paragraph 31 of the

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1 presentence report, which pertains to a prior conviction,
2 indicates that the defendant was found to be in possession of
3 not just drugs on that occasion, but various police
4 paraphernalia.

5 Do you know what the story is with that?

6 MS. TARLOW: I don't, your Honor. I don't have
7 additional context to that offense.

8 THE COURT: Lastly, I am not sure how much or whether
9 this even matters, but was the girl involved in the first
10 instance, was she actually 12? I know that the defendant
11 claims that she initially said she was 17. Do you know what
12 her true age is or was at the time?

13 MS. TARLOW: She was 12 years old, your Honor.

14 THE COURT: All right. Thank you.

15 Ms. Shroff, I've read all of your submissions,
16 including the forensic psychological report and letters, so you
17 don't need to repeat what you have already told me, but give me
18 your thoughts.

19 MS. SHROFF: So I just want to correct or at least
20 amplify one argument that the government made, that they were
21 disturbed by what Mr. Zarzar told Dr. Termini. If the Court
22 could take just take a look at page 14 of Dr. Termini's report.

23 THE COURT: Could you keep your voice up and speak
24 into the microphone, please.

25 MS. SHROFF: Sure.

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1 It's Exhibit A. I just want to make sure -- because
2 the government did not quote Dr. Termini in her entirety -- the
3 Court has what she says. "The objective results of
4 psychosocial testing reveal that Mr. Zarzar is not sexually
5 attracted to minors aged 13 or younger. He has a primary
6 attraction to females aged 14 to 17, followed by adult females,
7 which is a normal profile for a heterosexual male, and may be
8 reflective of the age group that he is emotionally best able to
9 identify with."

10 That is the entirety of the text that Dr. Termini
11 wrote for the government, the defense, and the Court. So it
12 would be inaccurate for the government to be troubled by
13 Mr. Zarzar's very truthful statement to the doctor who was
14 evaluating him, because he falls squarely within the normal
15 psychological profile. Although none of us may want to have
16 that profile front and center, as Dr. Termini notes that is a
17 normal profile and he does not fall in an aberrant range.

18 THE COURT: You are telling me that it is a normal
19 profile for somebody in his 30s to be attracted to 14-year-old
20 girls?

21 MS. SHROFF: I am not saying that. I'm telling you
22 what Dr. Termini said, and what Dr. Termini says is that that
23 would be a normal profile for somebody if he were -- I think
24 what she's saying is that it falls within the normal range of
25 when an average group of men are tested, and that's what their

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1 reflexes say. So he would fall within the norm.

2 I'm not suggesting to you that that is what Mr. Zarzar
3 actually feels or what Mr. Zarzar would actually act on. I
4 think what Dr. Termini is saying is if she administered the
5 test to a hundred people of the same age group, that's the test
6 result, and that is what it would show. That is what I am
7 trying to say.

8 THE COURT: All right. Go ahead.

9 MS. SHROFF: I also want to take a step back and
10 explain to the Court that Mr. Zarzar does not in any way say
11 he's not responsible for his conduct because of his addiction.
12 I don't think that Mr. Zarzar has ever said that in his
13 letters, and certainly not in the submission that has been set
14 forth to the Court.

15 Government counsel did make a statement recently when
16 they said that Mr. Zarzar did not have a moment of clarity.
17 That is in fact true. He didn't have a moment of clarity. If
18 you walk back not just in terms of the offense conduct in this
19 case but also walk into back into Mr. Zarzar's chronological
20 life, it is truly unfortunate. It's a confluence of some very
21 unfortunate events that bring him before you today.

22 As the government said, there's nothing in his past,
23 not on his computers, not on his e-mail, not in his home,
24 nowhere is there any indication of this very aberrant conduct.
25 Nothing.

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1 He does not have pornography on any of his devices.
2 He had a terrible, terrible break. The break was precipitated
3 by so many things that were going on for him. There is no
4 doubt he had a horrible childhood. That is compounded by the
5 lack of intervention, and unfortunately many a parent who says
6 a child will grow out of it.

7 He gets his life together. He has a girlfriend. He
8 finally gets a job. He finally gets into a union. Through no
9 fault of his, he's literally in an accident, an accident that
10 completely annihilates almost everything that could have gone
11 right for him.

12 This is not a man who turned to drugs because he was
13 weak. This is not a person who went and got high because it
14 was fun. This is a person about whom books are written now,
15 movies are made, the terrible opioid addiction. The addiction
16 is just as bad when it's a defendant who's before you as
17 opposed to, you know, the person to whom that opioid is being
18 sold, and when I stand next to the person who sold it.

19 Mr. Zarzar, it's really unfortunate that he was hit in
20 an accident, that he did get prescribed opioids, and for
21 whatever inherent weakness he has, he could not deal with his
22 pain without this continued addiction on drugs.

23 That's what brought Mr. Zarzar to almost the brink.
24 Even through all that period he never did anything remotely
25 reflecting the conduct in this case. I think he truly snapped

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1 when he saw the woman that he loved, whom he broke up with
2 because he could no longer support her and he thought he was so
3 far gone that it would be unfair to keep him engaged to him,
4 with another man.

5 Also, the conduct, how this conduct starts, he doesn't
6 go looking for a young girl. It happens upon him. Should he
7 have exercised better judgment? Absolutely. Should he have
8 stopped when he figured out she was 12 and not 17 as she said?
9 Of course. Does it lessen his conduct that all of these bad
10 things happened to him? No.

11 But that's why he pled guilty, and that's why he has a
12 mandatory minimum of 60 months. 60 months is not a short
13 sentence. 60 months is not an insignificant sentence.

14 But, look, the government is an advocate for its
15 position. I am certainly hopefully an advocate for Mr. Zarzar.

16 The only objective person in this room other than this
17 Court is the probation officer. The probation officer here,
18 Mr. Ross Kapitansky, is a seasoned, thoughtful probation
19 officer. I reread his recommendation section several times,
20 and he recommends a 60-month sentence here.

21 He did not find Mr. Zarzar to be excusing his conduct.
22 He did not say Mr. Zarzar was pretending or malingering. He
23 did not say Mr. Zarzar deserves no time. If the Court will
24 recall your own experience with Mr. Kapitansky -- I certainly
25 recall mine -- he is certainly a middle-of-the-road probation

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1 officer. His recommendation should count far more than my
2 advocacy. His recommendation was for 60 months. I ask the
3 Court to focus on the reasons why Mr. Kapitansky recommended
4 such a sentence.

5 I just want to say one final word about Mr. Zarzar. I
6 do not know him well because I'm standing up for my colleague,
7 but Mr. Zarzar has made a concerted effort to show the Court
8 that he is a different person. MCC is full of drugs; Valhalla
9 is full of drugs. He has not once relapsed. He has worked
10 with the pretrial and with the paralegal in our office who's
11 here in Court today. He's worked with the social worker who
12 works not just with him but also works with his family, because
13 the only way to confront addiction is to work with those who
14 are supporting Mr. Zarzar, and that includes his mother, who,
15 as the probation officer notes, did not fully realize the depth
16 of his addiction, and we're hopeful that she will continue
17 working with Mr. Angel Vasquez, who is the social worker, and
18 she will be well prepared over the next four years to help
19 Mr. Zarzar when he's released.

20 He's not making a promise to you that nothing will go
21 wrong. I think he has worked really hard to show you that he
22 is serious about changing and that he's serious about staying
23 sober. If there's one thing that is clear from his profile, it
24 is that in the 31 years he has been here, this is the only time
25 he has ever engaged in this type of conduct.

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1 The government routinely falls back on other evidence
2 to support what they think is a person's proclivity. If you
3 fall back on it in this case, you will see there is none. I do
4 not think Mr. Zarzar will ever repeat this conduct because I do
5 not think he would have done it but for the very bad space that
6 he was in, and I do believe that he will have moments of
7 clarity upon his release.

8 60 months is a long time, your Honor, and I ask you to
9 impose the sentence recommended by the department of probation
10 in this case, with the concomitant five years of supervised
11 release, which will ensure supervision, which will ensure that
12 it comports and that it complies.

13 Finally, he will be required to register as a sex
14 offender. That registration will also severely curtail all of
15 his freedoms and certainly give him a deep, deep amount of
16 supervision.

17 I know I've spoken a little bit too long, but thank
18 you.

19 THE COURT: Thank you, Ms. Shroff.

20 Mr. Zarzar, is there anything that you wish to say
21 before I sentence you?

22 THE DEFENDANT: Yes. Should I stand?

23 THE COURT: Why don't you stay seated so that you can
24 speak into the microphone please. Just speak loudly and
25 clearly and slowly.

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1 THE DEFENDANT: I just want you to know that the
2 person that's sitting here today, I still look back at these
3 charges that are brought and I can't understand how I -- I am
4 not the same person who was charged with these charges.

5 My entire life I have been through many things, but I
6 never -- I was always a person who was trying hard, always
7 trying to achieve, to aspire to do something, to be someone to
8 do something, to work to become more and better and better than
9 what I am.

10 Getting into drugs was something that I never in my
11 life ever thought would happen to me. I look at the picture
12 that -- today was the first time I saw the picture of what I
13 looked like when he got arrested in color. And I'm sorry, but
14 it's just -- I can't -- I can't -- it just doesn't register in
15 my head.

16 I have been locked up now for ten months now. I have
17 been locked up and I have been nonstop trying to just be back
18 trying to be a normal person again, a person who's not
19 addicted, a person who is not doing things that are not, that
20 are not normal to do.

21 As soon as I got myself healthy again, I got a job in
22 MCC. I started working in the kitchen. I took courses in the
23 educational department to occupy my other time, took a course
24 working as a -- what do you call it? A suicide watch inmate
25 companion, to help other people, to keep myself busy. I wanted

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1 to do work as an electrician in MCC because that's what I'm
2 good at, but that wasn't available for some reason pretrial.

3 Every day I wake up and I make sure that I will not in
4 any chance have any opportunity to get into a position where I
5 will use drugs, even though there is drugs around me. I know
6 that I did something wrong and I'm not making excuses for it,
7 and I know that I need to be punished.

8 Moving forward I just want to be a better person and
9 make sure that I stay out of this kind of trouble again, stay
10 away from drugs. Unfortunately in the Jewish community being
11 addicted to drugs is a very taboo subject. It is something
12 that nobody wants to address.

13 Hopefully one day after I get out and I get my life
14 back on track and I become a productive member of society once
15 again I can maybe try to make a difference in that, because
16 what I went through is not something that I would wish on my
17 worst enemy.

18 I hope that I can help make one day, if possible,
19 after I help myself, now that I am going to be doing time, I am
20 going to be taking whatever programs I can take to help myself
21 stay and better myself and not get into a position where drugs
22 become an issue for me again. I am aware that even taking -- I
23 know that taking RDAP isn't going to get me a time reduction.
24 I'm still going to do it just so I can help myself.

25 THE COURT: All right. Thank you very much,

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1 Mr. Zarzar.

2 I want to just give the gentleman who is here an
3 opportunity to indicate if he has reconsidered and would like
4 to address me, in which case I'm prepared to adjourn.

5 Otherwise, I'm prepared to proceed.

6 All right. He's shaking his head no, so I will
7 proceed.

8 Counsel, is there any reason why sentence should not
9 be imposed at this time?

10 MS. TARLOW: No, your Honor.

11 MS. SHROFF: No, your Honor.

12 THE COURT: In imposing sentence I'm required to
13 consider the factors set forth in Title 18, United States Code,
14 Section 3553(a).

15 In the interest of time, I am not going to recite them
16 at length, but suffice it to say that I have and will consider
17 all of them, including the sentencing guidelines range, which I
18 have found to be 108 to 135 months' imprisonment, and the
19 purposes of sentencing set forth in subsection (a)(2) of the
20 statute. Ultimately, I'm required to impose a sentence that is
21 sufficient, but no greater than necessary to comply with the
22 purposes of sentencing set forth in subsection (2) of the
23 statute.

24 Now, like the government, I do think that there are
25 reasons to vary from the guidelines range and impose a

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1 below-guidelines range here. Those include the defendant's
2 history and characteristics, including what was clearly a very
3 difficult childhood and to some extent the history of the
4 mental health and substance abuse problems.

5 I also think that the steps that Mr. Zarzar has taken
6 while in custody are commendable. I commend you for taking
7 them and trying to get your life back on track in the ways that
8 you've described. Even if, for example, you don't qualify for
9 credit through the RDAP program, I think it certainly is in
10 your interest to pursue any and all opportunities of that sort
11 that are presented to you.

12 Having said that, I do think a substantial sentence is
13 warranted here for a number of reasons. The offense here and
14 the offense conduct is, to use the probation officer's term,
15 vile and despicable. I don't think anybody should think
16 otherwise. Nor was it a single solitary act. It was conduct
17 that took place over a two-month period that involved a fair
18 bit of planning and calculation. That includes the effort to
19 get the victim a phone, to track down her home address, and to
20 take steps to locate her and really stalk her.

21 At the end of the day, we are talking about a
22 12-year-old girl. I don't know whether she in person looks
23 closer to 17 in a way that might have given the defendant some
24 reason to believe that claim initially, but certainly he
25 harbored no illusions about her age during the course of the

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1 conduct that I just described, and that is abhorrent behavior
2 and behavior that warrants substantial punishment.

3 On top of that, I do recognize the portion of the
4 sentence that Ms. Tarlow omitted when she referenced the
5 apportionment of the forensic report, but I have to say that I
6 too was struck by the fact that a report commissioned and
7 submitted by the defendant himself stated that his primary
8 attraction was to 14 to 17-year-old girls.

9 I don't know if that's normal. It doesn't strike me
10 as normal, but in a case involving a person who sought to
11 entice a minor to engage in sexual acts in fairly egregious and
12 explicit ways, that strikes me as a major concern.

13 It is not only unlawful, but it is despicable to prey
14 upon girls of the age of 14. I am just not willing to take the
15 chance that based on Mr. Zarzar's own attraction the defense
16 letter says that Mr. Zarzar is "no threat to break the law
17 again" When push comes to shove, I am just not quite as
18 optimistic about that. I sure hope that is right.

19 I hope that he gets the drug treatment that he so
20 sorely needs, that he gets the mental health treatment that he
21 also clearly needs. Indeed, in that regard I note that some of
22 his behavioral problems predate the 2012 accident by a number
23 of years. Indeed, they go back to second grade as far as I can
24 tell from the presentence report, but the bottom line is I
25 think there is a significant danger of relapse, and in that

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1 regard the need for both specific deterrence and a need to
2 protect the public from further crimes of the defendant.

3 I hope that this is aberrant behavior, but the fact of
4 the matter is I am just not willing to take the chance that it
5 is, and there are reasons to be concerned.

6 So I will state the sentence that I intend to impose
7 and would ask you, Mr. Zarzar, to please rise.

8 Mr. Zarzar, it is the judgment of this Court that you
9 are remanded to the custody of the Bureau of Prisons for a
10 period of 84 months, that is seven years, to be followed by a
11 period of five years of supervised release.

12 During your term of supervised release, you will be
13 subject to the following mandatory conditions:

14 You shall not commit another federal, state or local
15 crime.

16 You shall not illegally possess a controlled
17 substance.

18 You shall refrain from any unlawful use of a
19 controlled substance and submit to one drug test within 15 days
20 of your release on supervised release and at least two periodic
21 drug tests thereafter as determined by probation.

22 You shall cooperate in the collection of DNA as
23 directed by probation, and you must comply with the
24 requirements of the Sex Offender Registration and Notification
25 Act as directed by the probation officer, the Bureau of

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1 Prisons, or any state sex offender registration agency in which
2 you reside or work, are a student, or were convicted of a
3 qualifying offense.

4 In addition, the standard conditions of supervised
5 release set forth in the presentence report and in the judgment
6 will apply.

7 Among other things, you shall not possess a firearm or
8 destructive device, and you shall report to the probation
9 office in the judicial district where you are authorized to
10 reside within 72 hours of your release from custody.

11 Finally, you must meet the following special
12 conditions:

13 First, you shall participate in an outpatient drug
14 treatment program approved by the United States Probation
15 Office, which program may include testing to determine whether
16 you have reverted to using drugs or alcohol.

17 I authorize the release of available drug treatment
18 evaluations and reports to the substance abuse treatment
19 provider as approved by the probation officer.

20 You shall be required to contribute to the cost of
21 services rendered -- that is, to make a copayment -- in an
22 amount determined by the probation officer based on your
23 ability to pay or the availability of third-party payment.

24 You shall participate in an outpatient mental health
25 program approved by the probation department.

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1 You shall continue to take any prescribed medications
2 unless otherwise instructed by your health care provider.

3 You shall contribute to the cost of services rendered
4 not covered by third-party payment if you have the ability to
5 pay.

6 I authorize the release of available psychological and
7 psychiatric evaluations and reports to your health care
8 provider.

9 You must participate in the computer and Internet
10 monitoring program administered by the United States Probation
11 Office. You must provide the probation office advance
12 notification of any computer or computers, automated services
13 or connected devices that will be used during your term of
14 supervision and that can access the Internet.

15 The probation office is authorized to install any
16 application as necessary to survey all activity on those
17 computers or connected devices owned or operated by you. You
18 may be required to pay the cost of monitoring services at the
19 monthly rate provided by the U.S. Probation Office. The rate
20 and payment schedule are subject to periodic adjustments by the
21 probation office.

22 The probation office shall be notified via electronic
23 transmission of impermissible or suspicious activity or
24 communications occurring on any such computer or connected
25 device.

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1 Consistent with the computer monitoring policy in
2 effect by the probation office, as triggered by impermissible
3 suspicious activity, you must consent to and cooperate with
4 unannounced examinations of any computer equipment owned or
5 used by you. This examination shall include, but is not
6 limited to, retrieval and copying of all data from the
7 computers, connected devices, storage media, and any internal
8 or external peripherals and may involve removal of such
9 equipment for the purpose of conducting a more thorough
10 inspection.

11 You must not have contact with the victim in this case
12 or any member of her family. This includes any physical,
13 visual, written, or telephonic contact with those persons.
14 Additionally, you must not directly cause or encourage anyone
15 else to have such contact with the victim or members of her
16 family.

17 You shall submit your person, residence, place of
18 business, vehicle, or any property or electronic device under
19 your control to a search on the basis that the probation
20 officer has a reasonable belief that contraband or evidence of
21 a violation of the conditions of supervised release may be
22 found. That search must be conducted at a reasonable time and
23 in a reasonable manner. Failure to submit to a search may be
24 grounds for revocation, and you shall advise any other
25 residents that the premises may be subject to search pursuant

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1 to that condition.

2 You shall undergo a sex offense specific evaluation
3 and participate in a sex offender treatment and/or mental
4 health treatment program approved by the probation officer.

5 You shall abide by all rules, requirements, and
6 conditions of the sex offender treatment program, including
7 submission to polygraph testing.

8 You shall waive your right to confidentiality in any
9 records for mental health assessment and treatment imposed as a
10 consequence of this judgment to allow the probation officer to
11 review your course of treatment and progress with the treatment
12 provider.

13 You shall be required to contribute to the cost of
14 services rendered in an amount approved by the probation
15 officer based on your ability to pay or the availability of
16 third-party payment. And I authorize the release of available
17 psychological and psychiatric evaluations and reports,
18 including the presentence report, to the sex offender treatment
19 provider and/or mental health treatment provider.

20 You shall not have deliberate contact with any child
21 under 18 years of age unless approved by the probation officer.

22 You shall not loiter within 100 feet of schoolyards,
23 playgrounds, arcades, or other places primarily used by
24 children under the age of 18.

25 And you shall be supervised in the district of your

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1 residence.

2 I am not going to impose a fine because I find that
3 you do not have the ability to pay a fine.

4 I am, however, imposing the mandatory special
5 assessment of \$100, which shall be due and payable immediately.

6 Does either counsel know of any legal reason why the
7 sentence should not be imposed as stated?

8 MS. TARLOW: No, your Honor.

9 MS. SHROFF: I know of no legal reason.

10 THE COURT: The sentence as stated is imposed. I find
11 that the sentence is sufficient, but no greater than necessary,
12 to satisfy the sentencing purposes set forth in Section
13 3553(a)(2), including the need to promote respect for the law,
14 to provide just punishment for the offense, to afford adequate
15 deterrence, and to protect the public from further crimes of
16 the defendant.

17 Ms. Shroff, do you have any request with respect to
18 designation recommendation for the Bureau of Prisons?

19 MS. SHROFF: May I just have a moment, your Honor.

20 THE COURT: You may.

21 THE DEFENDANT: Your Honor, may I make a statement,
22 please.

23 THE COURT: I'm sorry?

24 (Defense counsel and the defendant conferred)

25 MS. SHROFF: Your Honor, Mr. Zarzar wants to correct a

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1 matter. He would like the Court to know that the statement
2 reflected in Dr. Termini's report is inaccurate, and he wants
3 the Court to know that.

4 THE COURT: Understood. You had an opportunity to
5 speak to me and that opportunity, you availed yourself of it.
6 So at this time I am going to say no to that question.

7 Ms. Shroff, any request with respect to a designation
8 location?

9 MS. SHROFF: He would like to be designated at
10 Otisville, please.

11 THE COURT: All right. I will recommend that he be
12 designated to a facility as close to New York City as possible
13 to facilitate the maintenance of ties to his family, and, if
14 appropriate, to Otisville where, among other things, I suspect
15 that the resources and community would provide him with
16 religious opportunities that he might not have elsewhere.

17 Mr. Zarzar, I urge you to take advantage of any and
18 all treatment programs while you are in custody that you can in
19 the way that you described.

20 It's clear to me that you have any number of issues
21 that you need to contend with, and I would urge you to take
22 advantage of whatever is made available to you now. Certainly
23 when you get out you're obviously required to do so, but I
24 would urge you to take advantage of the resources and support
25 that probation will provide to you and at least some of your

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1 family clearly will provide to you to ensure that you don't
2 backslide, that you do get your life on track in the way that
3 you indicated you would like to so that you don't engage in any
4 sort of conduct of the sort that happened here.

5 You obviously do have talents and strike me as
6 somebody who could contribute to the world in the way that you
7 have been trying while in custody. I hope that you are able to
8 continue that and put this behind you when you have the
9 opportunity do that.

10 Ms. Tarlow, there are open counts to be dismissed, is
11 that correct?

12 MS. TARLOW: Yes, your Honor.

13 THE COURT: They are dismissed at this time.

14 Mr. Zarzar, to the extent that you have not given up
15 your right to appeal either your guilty plea or the plea
16 agreement you entered into in connection with your plea, you
17 have the right to appeal. Any notice of appeal must be filed
18 within 14 days of the entry of the judgment of conviction. If
19 you cannot afford to pay the costs of an appeal, you may apply
20 for leave to appeal in forma pauperis.

21 THE COURT: Anything else, Ms. Tarlow?

22 MS. TARLOW: No, your Honor.

23 THE COURT: Ms. Shroff.

24 MS. SHROFF: May I just have a moment?

25 THE COURT: You may.

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1 (Defense counsel and the defendant conferred)

2 MS. SHROFF: No, your Honor. Thank you.

3 THE COURT: All right. In that case I will stay on
4 the bench, but the matter is adjourned.

5 (Adjourned)

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